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FILED DISTRICT COURT
Third Judicial District

MAR - 9 1990

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL)	FINDINGS OF FACT AND
DETERMINATION OF THE RIGHTS)	CONCLUSIONS OF LAW
TO THE USE OF ALL THE WATER,)	
BOTH SURFACE AND UNDERGROUND,)	EMIGRATION CREEK
WITHIN THE DRAINAGE AREA OF)	SALT LAKE COUNTY EAST DIVISION
UTAH LAKE AND JORDAN RIVER)	(Brest van Kempen Protest)
IN UTAH, SALT LAKE, DAVIS,)	
SUMMIT, WASATCH, SANPETE)	Civil No. 57298
AND JUAB COUNTIES IN UTAH.)	Judge Timothy R. Hanson

This matter came before the Court for trial on July 13 and 14, 1989, with the Honorable Timothy R. Hanson presiding.

C.J.H. Brest van Kempen, et al. ("Protestants"), who filed the protest against the State Engineer's Proposed Determination, were represented by E. Craig Smay.

The "Bertagnoles" (five individuals, named below, who own some of the protested water rights) were represented by William P. Schwartz.

The State Engineer was represented by R. Douglas Credille and John H. Mabey, Jr. of the Utah Attorney General's Office.

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ATTORNEY GENERAL

Despite notice, Bertagnole Investment Company ("BIC"), which had filed Water User Claims covering some of the protested water rights, did not appear or participate in the trial of the protest.

The issue was whether certain stockwatering rights, claimed respectively by BIC and the Bertagnoles, were forfeited under Section 73-1-4, U.C.A. (1953), for nonuse. The Court received documentary and testimonial evidence, and has considered oral and written arguments of counsel. Accordingly, the Court has issued a Memorandum Decision, and now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The water and water rights in dispute are located in the Emigration Creek drainage, Salt Lake County.

2. In connection with this General Adjudication of Water Rights, BIC filed 23 Water User Claims ("WUCs"): 57-7687; -7695; -8138; -8168; -3904; -7465 through -7479; -7693; -7696; and -8066.

3. In connection with this General Adjudication, the Bertagnoles filed 12 WUCs: 57-7480 through -7486; -7694; -7695; -7687; -8138; and -8168. The "Bertagnoles" consist of William T. Bertagnole, Gerald Bertagnole, Shirley A. Collingwood, Joyce Carolyn Meyer, and Nancy M. Eckert, who are all brothers and sisters.

4. Four of the above-stated WUCs were filed in the names of both BIC and the Bertagnoles: WUCs 57-7687; -7695; -8138; and -8168.

5. Although the Bertagnoles are related to the family that owns BIC, the two families' sheep operations have long been separate. The two groups have owned and used their water rights separately, and their interests in their respective water rights must be considered separately.

6. After duly examining the claims asserted in BIC's and the Bertagnoles' WUCs, and finding evidence that livestock had been present at and around the subject water sources, the State Engineer included those claims in the Proposed Determination of Water Rights.

7. Protestants then filed a protest, alleging the Proposed Determination should not have included these water rights because, allegedly, they were forfeited for nonuse.

8. Despite receiving direct notice of these proceedings, BIC (and its apparent successors-in-interest: CrossLand Savings; Western Savings & Loan, City Development, Inc.; and the Boyer Company) declined to appear or participate in the trial of this protest. Brooks Pace, another of BIC's apparent successors-in-interest, participated at the pre-trial stage, but did not actively participate in the trial. In any event, BIC's successors-

in-interest can have a water right through BIC only to the extent BIC's water right was not forfeited or abandoned.

9. BIC's 23 WUCs represent the claimed right to water a certain number of livestock from 23 different water sources.

10. BIC has not used its water right for more than 5 years. In addition, BIC has abandoned its interest in that right. BIC's intent to abandon is evidenced by BIC's nonuse of the water, and also by its failure, after notice, to appear at trial. BIC has not shown, by evidence or argument, any intent to keep its water right.

11. The Bertagnoles' 12 WUCs represent the claimed right to water a certain number of livestock from 12 different water sources.

12. The Bertagnoles have used their water right (represented by the 12 WUCs they filed) more than once every 5 years during the period at issue. However, their WUCs overstate the number of livestock actually watered from these 12 water sources. The actual number of sheep they have watered is 2,500.

CONCLUSIONS OF LAW

From its Findings of Fact the Court now concludes:

1. The Court has jurisdiction over this cause of action and the parties.

2. This proceeding is part of the General Adjudication of Water Rights.

3. The Court need not decide the issue Protestants raised about whether the Bertagnoles trespassed on Forest Service land. The protest must be decided on the fact of the water's use or nonuse within any 5-year period. The question of access is irrelevant here. Since they do not own the land allegedly trespassed upon, Protestants cannot complain that the Bertagnoles might have trespassed to gain access to the water.

4. The protest is granted against BIC. BIC has not used its water right as required by Section 73-1-4, and therefore has forfeited the water right represented by its 23 WUCs. In addition, BIC has abandoned its water right. Under Section 73-1-4(4)(b), this water right has ceased to exist and the water reverts to the public and is available for appropriation by members of the public, subject to the requirements and limitations of applicable law. However, there was no protest against the irrigation component of WUC 57-7479, which irrigation right therefore remains in force and unaffected by the Court's decision today.

5. The protest is denied as to the Bertagnoles' water right, except as follows. The amount of water they may use from their 12 water sources is limited to the amount that can be

beneficially used to water 2,500 sheep (i.e., 500 Equivalent Livestock Units, in the State Engineer's standard calculation).


6. The Bertagnoles cannot claim rights under the WUCs filed by BIC. First, the BIC water right no longer exists and the water is now public water subject to the laws of appropriation. Section 73-1-4(4)(b). Second, under Section 73-4-9, the Bertagnoles can claim a water right only on the basis of WUCs they have filed. If they ever had a right to use water from all 23 water sources claimed by BIC, the Bertagnoles forfeited that right as to 11 of those water sources when they filed only 12 WUCs. Section 73-4-9. The Bertagnoles' right is limited to the 12 WUCs they filed.

7. The State Engineer's Proposed Determination is confirmed as to these protested Water User Claims, except as modified by the Court's decision today.

8. No costs or attorney fees are awarded.

DATED this 9 day of March, 1990.

BY THE COURT:



TIMOTHY R. HANSON
District Court Judge